STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 13, 2005
v	No. 254616 St. Clair Circuit Court
JOHN GUZMAN, Defendant-Appellant.	LC No. 03-002285-FH

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a). He was sentenced as a second-offense habitual offender, MCL 769.10, to two concurrent terms of 14 to 22 ½ years' imprisonment. We affirm.

Defendant first argues that his trial testimony was improperly impeached by a prior inconsistent statement. We disagree. The use of prior inconsistent statements for impeachment is an evidentiary matter dependant on relevancy. *People v Sholl*, 453 Mich 730, 735; 556 NW2d 851 (1996). The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Furthermore, reversal is only required based on an evidentiary ruling if the error was prejudicial. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003).

A defendant may be "impeached with prearrest and pre-*Miranda*[1] statements, including omissions within those statements . . . ." *Sholl*, *supra* at 735.

> "[W]hen an individual has opted not to remain silent, but has made affirmative responses to questions about the same subject matter testified to at trial, omissions from the statements do not constitute silence. The omission is nonverbal conduct that is to be considered an assertion of the nonexistence of the fact testified to at

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> trial if a rational juror could draw an inference of inconsistency. To be sure, the witness may explain the omission by a desire not to implicate himself or because of a lapse of memory. Such explanations, however, do not remove the relevance of the inconsistency." [*Id*. at 736, quoting *People v Cetlinski*, 435 Mich 742, 749; 460 NW2d 534 (1990).]

At trial in this case, defendant related a somewhat complicated version of events concerning how and why the young complainant came to be at defendant's apartment on the night in question. This testimony was contradicted by the complainant's testimony. Before his arrest, defendant had given a statement to the Port Huron Police Department. The police report apparently failed to include defendant's trial version of why the complainant was at his apartment on the night in question.[2] From the record, it is apparent that, while the prosecutor stated that she wanted defendant to refresh his recollection with the police report, she actually was trying to give defendant an opportunity to explain the information recorded in the police report in accord with MRE 613(b). Defendant denied any lapse in his memory and asserted that he had in fact told the investigating officer how the complainant got to his apartment, although the investigating officer contradicted this testimony. The prior statements at issue were voluntarily made by defendant before his arrest and before *Miranda* warnings were given to him. We conclude that the trial court did not abuse its discretion in allowing the impeachment based on the asserted omission, because a rational juror could draw an inference of inconsistency therefrom. Accordingly, the attempted impeachment was proper. *Sholl*, *supra* at 735.

We also reject defendant's assertion that the prior statement was inadmissible hearsay, because it was not offered to prove the truth of the matter asserted in the prior statement. MRE 801(c). Rather, the statement was offered to impeach defendant's credibility because "it would have been natural and expected under the circumstances for defendant to have asserted" the story concerning how the complainant came to be at his house when he spoke with the police. *People v Alexander*, 188 Mich App 96, 103; 469 NW2d 10 (1991).

Defendant's next assertion – that reversal is required because no limiting instruction was given concerning the impeachment testimony – is also without merit. '"Where . . . there is no request for a limiting instruction, where there is no demonstration or likelihood of prejudice and where neither the court nor the prosecutor has suggested to the jury that the prior inconsistent statement could be used as substantive evidence, the trial judge's omission does not require a reversal.'" *People v Kohler*, 113 Mich App 594, 600; 318 NW2d 481 (1980), quoting *People v Mathis*, 55 Mich App 694, 697; 223 NW2d 310 (1974). Defendant's assertion of error on this point fails in all three respects.

Defendant next asserts that this case must be remanded for resentencing because the trial court referenced defendant's rejection of a plea offer while issuing its sentencing decision. We disagree. This issue presents an unpreserved constitutional question, which this Court reviews for plain error affecting the defendant's substantial rights. See *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

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[2] The police report was not introduced into evidence, but its contents were referenced at trial.

This Court has noted the following:

> It is not per se unconstitutional for a defendant to receive a higher sentence on a trial conviction than was promised him if he would plead guilty. . . . Nevertheless, courts have vacated sentences which were higher than what was promised if defendant pled guilty where the record supported any inference that the higher sentence was based on defendant's decision to go to trial rather than to plead guilty. [*People v Rivers*, 147 Mich App 56, 60-61; 382 NW2d 731 (1985).]

In this case, the record indicates that the trial court was searching for a reason to impose a lower sentence than was recommended in the presentence information report (PSIR). In searching for such a reason, the court noted that the plea deal defendant rejected would have assured him of a substantially lower sentencing range. The court went on to note that the defendant was entitled to maintain his innocence "and I certainly don't punish a person for that . . . ." We conclude that the implication of the reference to the plea deal, when read in context, is that the court at first believed that perhaps a sentence within that lower sentencing range would have been more proportionate to the crime. However, it is apparent that as the court further reviewed the facts of the case, including the lack of credibility of defendant's trial testimony, defendant's age and that of the complainant, and the nonconsensual nature of the sexual intercourse, the court concluded that the sentence recommended in the PSIR was appropriate. The trial court was not punishing defendant for maintaining his innocence and insisting on his right to a trial, but was looking for a reason to impose a lower sentence than the recommended sentence, and, finding no such reason, the court adopted the recommendation. Accordingly, we conclude that there was no plain constitutional error affecting defendant's substantial rights that precludes application of MCL 769.34(10). Therefore, defendant's sentences, which fall within the legislative guidelines, must be affirmed.

Defendant also asserts that he was denied the effective assistance of counsel. Again, we disagree. "Generally, a motion for a new trial or an evidentiary hearing is a prerequisite to appellate review of a claim of ineffective assistance of counsel." *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Because no such hearings were held in this case, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Determination of whether a defendant has been denied effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's factual findings for clear error, while the trial court's constitutional determinations are reviewed de novo. *Id*.

Effective assistance of counsel is presumed, and a defendant bears a heavy burden in establishing otherwise. *LeBlanc*, *supra* at 578. To establish ineffective assistance, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) a reasonable probability that, but for the error, the result of the proceedings would have been different; and (3) the concomitant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant first asserts that his trial counsel was ineffective for failing to obtain exclusion of the impeachment evidence discussed above and for failing to object to the lack of an instruction to the jury with regard to the proper use of the impeachment evidence. However, as

explained above, we conclude that defendant was properly impeached with his prior statement. Defendant's claim that his attorney was ineffective for failing to obtain exclusion of the evidence is without merit and is not supported by the record. Nor has defendant met his burden of showing that there is a reasonable probability that, but for the lack of a limiting instruction, the result of the proceedings would have been different. *Rodgers*, *supra* at 714.

Defendant further asserts that his trial counsel was ineffective for failing to emphasize the inconsistencies in the stories presented by the prosecution witnesses. However, the inconsistencies and alleged credibility problems in the stories that the prosecution witnesses gave were the focus of defendant's trial counsel's closing statement. Accordingly, it is unclear how defendant's conviction despite these inconsistencies can be attributed to defendant's trial counsel's performance. Defendant has simply failed to show that his trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, a reasonable probability that the outcome would have been different if his trial counsel had acted differently, or that the proceedings were fundamentally unfair or unreliable. Therefore, defendant has failed to meet his burden with regard to this issue. *Rodgers*, *supra* at 714.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette